

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.10.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.3225 of 2017 and
C.M.P.No.20024 of 2017

Jayavel

... Appellant/Petitioner/Defendant

Vs.

1. Jaganathan (died)
2. Neela
3. Arutchelvan
4. Anbuselvi

(Respondents 2 to 4 brought on record as LRS of the Sole respondent vide court order dated 03.07.2018 made in C.M.P.No.9990 of 2018 in C.M.A.No.3225 of 2017) ... Respondents

Civil Miscellaneous Appeal is filed under Order XLIII Rule 1 of Civil Procedure Code to set aside the Fair and Final order dated 04.07.2017 passed in I.A.No.293/2016 in O.S.No.160/2013 on the file of the court of II Additional District Judge at Salem by allowing the present appeal.

For Appellant : Mr.I.C.Vasudevan

For Respondents : Mr.Adithyavaradarajan - R2
Mr.J.Selvaraju - R3 and R4
R1-Died steps taken

J U D G M E N T

The present Civil Miscellaneous Appeal has been filed to set aside the order dated 04.07.2017 passed in I.A.No.293/2016 in O.S.No.160/2013 on the file of II Additional District Judge, Salem by raising various grounds.

2. According to the appellant, the suit, viz., O.S.No.160 of 2013 was filed by the respondent for specific performance and the appellant is the defendant in the suit. The suit was decreed exparte on 31.10.2014. The appellant had filed a petition in I.A.No.293 of 2016 on 25.11.2014 under Order 9 Rule

13 and Section 151 of Civil Procedure Code seeking to set aside the exparte order passed on 31.10.2014 and the same is within the limitation period of 30 days. The said petition was returned to the appellant on the ground that notice to other side was not served and he could not represent the same, because he was not aware of the fact. In the meanwhile, the respondent has filed Execution Petition and thereafter, it came to the knowledge of the learned counsel for the appellant and he represented the said petition stating that when the above case is posted for trial, the appellant was admitted in hospital and was taking medical treatment for Blood Pressure. Since Blood Pressure did not come down, he was bed ridden for one month and he recovered partly, then, he came to know that and the said exparte decree of the suit was decreed on 31.10.2014.

3. It is the further case of the appellants that in the said I.A.No.293 of 2016, the respondent / plaintiff has filed a counter stating that the averments in the affidavit filed by the appellant/defendant are false and incorrect. It is true that the defendant has filed a written statement and when the matter was listed for trial on 18.09.2014, there was no appearance either by the appellant or by his counsel, hence the petition to set aside the exparte decree was not ordered. Further, the counter would proceed to state that the averments of appellant that he had gone to medical treatment for either B.P. or was bed ridden for one month are all false. He has also submitted that originally the respondent / plaintiff has filed a suit for specific performance on 07.06.2013 and the same was decreed on 31.10.2014 and the respondent / plaintiff has paid the balance sale price.

4. Subsequently, the respondent / plaintiff has filed a Execution Petition No. 290 of 2015 for execution of Sale deed dated 22.07.2015 and the same was taken on file on 28.09.2015 and the same was ordered in favour of the respondent / plaintiff. The court directed him to produce non-judicial stamp papers for execution of sale deed on 22.08.2016. As per the said order, the respondent / plaintiff also submitted non-judicial stamp papers for a sum of Rs.15,05,000/- and after execution of sale deed by the Court, the appellant has prayed to set aside the petition, which was filed by him on 25.11.2014 to set aside the exparte decree. At that time, no notice was given to the respondent / plaintiff and it was returned and he has represented the same on 22.08.2016 only after execution of sale deed with an intention to drag on the proceedings. Further, without giving any notice to the respondent / plaintiff, the appellant has filed the petition and has given notice to the other side only on 29.10.2015, after a lapse of one year and had numbered it on 15.09.2016, after two years and the matter was listed on 20.10.2016 after execution of sale deed by the Court.

5. According to the respondent /plaintiff, only to drag on proceedings, the appellant has represented the same after two long years and after knowing very well that the sale deed has been executed, the same advocate, who appeared before the suit proceedings had appeared in the E.P. Proceedings and very well knowing about the pendency of the E.P., the appellant's counsel has numbered the petition, without any merit. This petition is filed in a vexatious manner only to harass the respondent / plaintiff and not to allow him to use the fruits of the said decree. He has also submitted that there was no medical certificate produced to show that when and where the appellant was taken medical treatment and medical bills were not available so as to show when he was discharged from the hospital.

6. In the meanwhile, before the E.P. Court, the appellant / defendant had filed a counter stating that the decree being exparte decree on 31.10.2014, the appellant / defendant has not received any money from the respondent/plaintiff. The respondent/plaintiff had threatened the appellant and got the signature from the appellant before the Sub- Registrar Office, Attur and the agreement of sale was executed. When the suit property is worth about 60 Lakhs, the respondent / plaintiff had fraudulently got executed sale agreement only for Rs.13,00,000/-. The respondent also submitted that the real truth is that the defendant has deposited a sum of Rs.2,00,000/- in a company, viz., Fine Future, which was allegedly paying more interest for the invested money, after knowing the fact that the respondent had also invested money and got interest. The plaintiff's wife and defendant's wife are neighbours and it was alleged that the wife of the appellant had made them to invest 13 Lakhs of ruppees in the said company. After some time, the said company was closed, the appellant and the defendant were put to financial crises. The respondent / plaintiff had threatened the defendant stating that only because of the appellant/ defendant's intention, they had invested so much of money and they have suffered a huge loss. Further, the appellant was threatened by filing a police complaint and he was forced to execute the alleged sale agreement before the Registrar Office using influence through police. Only after receiving lawyers notice, the appellant came to the sub-registrar office and executed the sale agreement on the undertaking that the plaintiff will cancel the said sale agreement after receipt of the amount from the said Company.

7. The learned counsel for the appellant contends that the real truth was not considered by the said Court, but it had simply dismissed the said application. Even though the delay was condoned, the application to set aside the exparte decree was not allowed. When E.P. was filed, the respondent /

plaintiff made false averments on the defendant's counsel stating that the defendant was not able to represent due to ill health. He also submitted that once the court accepted the reason and condoned the delay in the condonation petition on the very same reason under Order 9 Rule 13, the Court has dismissed the above petition, which is unsustainable in the eye of law.

8. The learned counsel for the appellant / defendant further contended that the appellant has filed the petition to set aside the exparte decree within the time and only for representation, there was a delay occurred and there was no fault on the part of the defendant, but due to the mistake committed by the counsel for the appellant, the appellant should not be penalised. He also relied on order of this Court in C.R.P.No.3213 of 2010 dated 22.10.2010 [Selvaraj V.R.Paulraj] and another Judgement rendered by the Gauhati High Court on 03.07.1985 [Prahlaad Chandra dey V. Assam Board of Revenue at Gauhati] and submitted that even now, the appellant is in possession of the property and he is ready to bear all the expenses for the past years and if the matter is allowed and remanded back, he will defend the case and prays to allow the petition. He also submitted that the lower court has not considered the valid points raised by them.

9. The learned counsel appearing for the respondent / plaintiff submitted that the suit was filed on 7.06.2013 for relief seeking specific performance. The suit property belongs to the defendant, which he inherited by way of partition on 06.02.2002 and the defendant offered to sell the property for a sum of Rs.15,00,00/- and the respondent intended to purchase the same and the sale agreement was executed on 08.10.2012 and registered before the Sub Register Office, Attur, as Document No.4911 of 2012. On the date of sale agreement, the defendant had received a sum of Rs.13,00,000/- and balance of 2 Lakhs of Rupees has to be paid to the defendant within two years from the date of sale agreement. Even from the date of sale agreement, the plaintiff was ready and willing to get the sale deed from the defendant. But on the date of sale agreement, the defendant did not bring his legal heirs those who are all eligible to sell the suit properties. Thereafter, the defendant executed the alleged sale agreement in favour of the plaintiff undertaking to execute sale deed along with his heirs. After executing the alleged sale deed in favour of the plaintiff, the defendant attempted to get signature with threat to falsify the registered sale agreement using his influence through the police. Hence the respondent/plaintiff issued a legal notice, through his lawyer to the police officials on 16.03.2013 calling them not to interfere in civil matters and obtain signature from him, as if

the registered suit sale agreement is false one and executed for the money alleged to have been invested by the respondent through appellant's wife in the company, viz., Fine Future. Further, the plaintiff to avoid unnecessary police threat, caused legal notice to the defendant on 01.04.2013 through his lawyer calling him to come along with his heirs and execute sale deed in respect of the suit properties after receipt of the balance sale price sum of Rupees 2,00,000/- from the plaintiff or otherwise to return the advance amount, which was received from the plaintiff. The defendant received the legal notice on 06.04.2013 and after receipt of the legal notice, he did not come forward to execute the sale deed in favour of the plaintiff in respect of the suit properties as agreed. On the other hand, the defendant gave a reply through his lawyer dated 10.04.2013 with false and untenable allegations. The respondent / plaintiff is always ready and willing to get the sale deed in respect of the suit properties at his cost even from the date of sale agreement, i.e., from 08.10.2012. Further, it is the duty of the defendant to execute the sale deed in respect of the suit properties, after receipt of the balance sale price of Rs.2,00,000/- . The appellant/defendant with a view to defeat and defraud the respondent is trying to encumber or alienate the suit properties in favour of third parties and the defendant is evading to perform his part of contract as agreed by him.

10. Heard the learned counsel on either side and perused the documents placed on record.

11. It is seen from the documents that the Sale Agreement dated 08.10.2002 was entered between the respondent/plaintiff and the appellant/defendant. The respondent / plaintiff has sent a Lawyers notice dated 01.04.2013 and the same was received by the appellant / defendant on 06.04.2013. On 10.04.2013, the defendant has sent a reply notice and on 07.06.2013, the suit was filed by the respondent / plaintiff. On 05.12.2013, the written statement was filed by the appellant/defendant. On 01.09.2014, Chief Examination of the respondent was taken and the suit was decreed as exparte on 31.10.2014. On 25.11.2014, the appellant has filed I.A. to set aside the exparte decree, which is well within the time. On 22.07.2015, E.P.No.290 of 2015 was filed for executing the sale deed and on 30.10.2015, appellant represented the returned I.A. and the same was returned again. On 01.04.2016, Counter was filed by the appellant in E.P.No.290 of 2015 and on 01.06.2016, appellant represented the said I.A. to be numbered [delay condoned]. On 15.09.2016, the said I.A.has been numbered as I.A.No.293 of 2016 and on 20.01.2017, counter to the said I.A. has been filed. On 14.07.2017, order was passed in I.A and on 10.07.2017, sale deed was executed by the Additional District Judge, Salem in favour of the respondent. It is contention of the appellant that when

the lower court is very well aware that I.A., has been filed for setting aside the exparte decree and the same is pending, without awaiting for the orders in the said petition, the lower court has proceed to execute the sale deed in the E.P.

12. On a perusal of the documents, it is evident that on 25.11.2014, the petition has been filed by the appellant for setting aside exparte decree and in the same court, E.P. was also filed on 22.07.2015. Since the appellant is in possession of the property, he had executed the sale agreement before the Sub Registrar Office. The appellant has not pursued any complaint and further, even assuming if there was coercion or threat made by the respondent / plaintiff, the appellant ought to have immediately filed a complaint and if the police have not entertained the complaint, he ought to have pursued a legal remedy available to them instead, they have represented the petition after two long years. There is no cogent reason given by the appellant for not representing the paper within a reasonable time. As stated in the delay petition, if he could not have represented due to ill health, no medical certificates have been produced to prove the same. If the husband is not well, the wife could have given a complaint before the police, if the appellant was pressurised to execute the sale deed. The appellant's wife never found out what is the status of the petition filed after they were set exparte. The reason for the condonation delay has been accepted but the very same reason cannot be accepted for setting aside the exparte decree and the merits of the said petition has to be considered by the court.

13. Further, from the order passed by the learned II Additional District Judge, Salem, it is seen that the appellant/defendant has filed his written statement denying the execution of sale agreement, but, when the matter was posted on 01.09.2014, the respondent was examined. Thereafter, when the case was adjourned thrice for cross examination, the appellant/defendant has not appeared and not chosen to cross examine the witness and thereafter, recording the same, the court was pleased to set the appellant / defendant as exparte on 31.10.2014. Thereafter, the appellant herein filed an petition Order 9 Rule 13 Civil Procedure Code on 25.11.2014 to set aside the exparte decree. However, in the affidavit it is stated that on 18.09.2014, the case was posted for trial and on that date, the appellant has gone to hospital for taking medical treatment for high blood pressure and he was bed ridden for one month and he had recovered partly and filed this petition and they stated that non appearance of the appellant on 18.09.2014 was neither wanton nor willful and the appellant has got a good defence in the case. On the other hand, the respondent / plaintiff has filed execution petition in R.E.P.No.290/2015 for execution of the sale deed and they also produced non judicial

stamp papers. The appellant has numbered the said petition after dragging it for two years. There was no sufficient cause shown by the appellant for not appearing before the court when the suit was posted for hearing. When the defendant has remained absent when the suit was called and there was no sufficient cause shown for taking Blood pressure treatment by examining the Doctor or by producing documentary evidence, such as medical reports or any oral or documentary evidence in support of the contentions made in the petition, the lower court has come to the conclusion that the present case is not the fit one to set aside the decree, in which exparte decree was passed. Summon was not duly served and the same does not fall within the provision of Order 9 Rule 13 Civil Procedure Code. When there was no sufficient cause shown for not representing papers within the said time and after 11 months, the appellant had served it on the respondent / plaintiff and again it was not represented immediately and represented only on 01.06.2016 , after the orders passed in E.P., they choose to represent and number the same, would show that the conduct of the appellant is only to protract the proceedings. The appellant has belatedly numbered the petition and the same could not be encouraged.

14. Since the appellant was negligent in taking action to set aside the exparte decree and no steps have been taken to show that he was more vigilant when proceedings are pending before the Court, also he has not acted upon diligently when the suit was contested, now, pleading that his act of non appearance was not willful and not due to the negligence of the appellant, cannot be accepted. In the absence of any cogent or valid reason shown by the appellant that there was delay in filing a petition or delay in representing petition, this Court is not convinced and not inclined to interfere with the order dated 04.07.2017 passed in I.A.No.293/2016 in O.S.No.160/2013 on the file of the court of II Additional District Judge at Salem.

In view of the above foregoings, the present Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

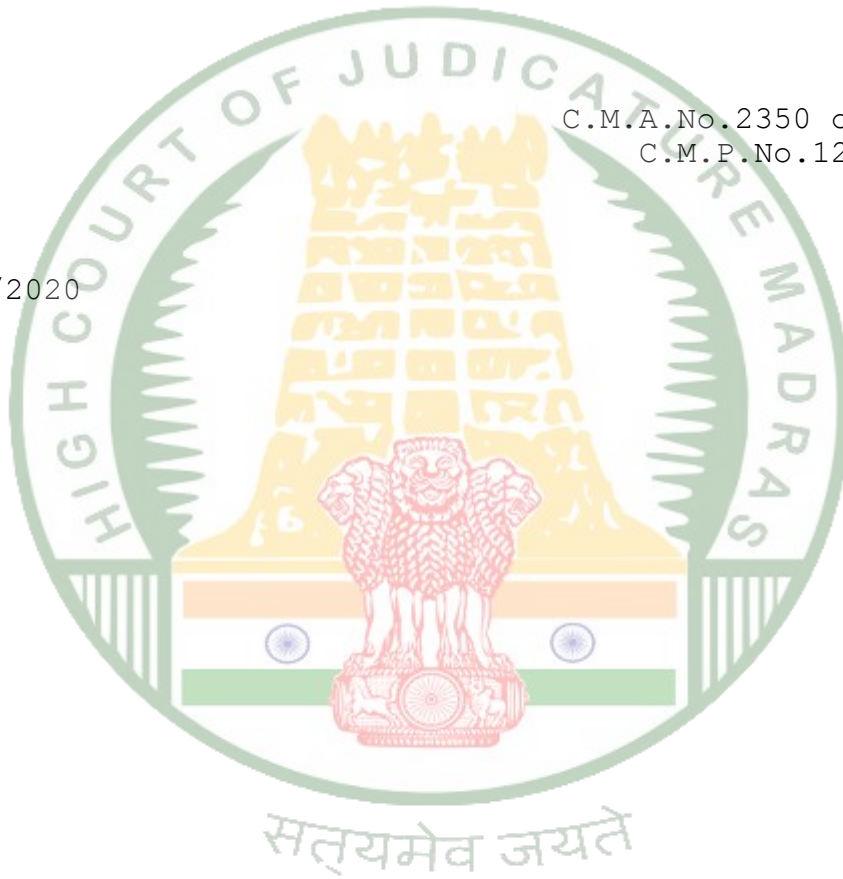
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To

1. The learned II Additional District Judge,
Salem.
2. The Section Officer,
VR Section,
Madras High Court,
Chennai.

C.M.A.No.2350 of 2017 and
C.M.P.No.12625 of 2017

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